Filed 3/18/19 Irene B. v. Superior Court CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

IRENE B.,

Petitioner,

v.

THE SUPERIOR COURT OF KERN COUNTY,

Respondent;

KERN COUNTY DEPARTMENT OF HUMAN SERVICES,

Real Party in Interest.

F078497

(Super. Ct. No. JD137249-00)

OPINION

THE COURT[*]

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. Louie L. Vega, Judge.

Francis L. Thompson for Petitioner.

No appearance for Respondent.

Margo A. Raison, County Counsel, and Jennifer E. Feige, Deputy County Counsel, for Real Party in Interest.

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[*] Before Poochigian, Acting P.J., Peña, J. and Smith, J.

Irene B. (mother) seeks an extraordinary writ from the juvenile court's orders issued on December 3, 2018, at a contested 18-month review hearing (Welf. & Inst. Code, § 366.22)[1] terminating her reunification services as to her then seven-year-old daughter Y.B. and setting a section 366.26 hearing to consider a permanent plan of adoption. Mother contends the juvenile court erred in finding it would be detrimental to return Y.B. to her custody. We deny the petition.

PROCEDURAL AND FACTUAL STATEMENT

In April 2017, the Kern County Department of Human Services (department) took then five-year-old Y.B. into protective custody after she disclosed that her mother's live-in boyfriend, Daniel, digitally penetrated her vagina, causing her pain and discomfort. Mother witnessed the sexual abuse but did not report it. She told Daniel to stop and to leave. Y.B. also reported Daniel slapped her with his hand and an unknown spiked object. He also hit her with a belt on her back, causing scratches and bleeding. Mother cleaned the blood from Y.B.'s back with her shirt and told Daniel to stop hitting her. Mother and Daniel told Y.B. not to tell anyone about the physical and sexual abuse. Y.B. also witnessed domestic violence between Daniel and her mother.

Mother refused to believe Daniel sexually abused her daughter and blamed the babysitter for influencing her. According to mother, the babysitter told Y.B. not to call Daniel " 'Dad' " or allow him to touch her because he was not her biological father. Mother initially denied knowing that Y.B. was experiencing pain and discomfort in her vaginal area but then admitted that she did know. When confronted with the inconsistency, mother blamed Y.B. for her own discomfort, claiming she " '[stuck] her own hands inside her vagina' " to stop from having diarrhea. Mother said she planned to continue her relationship with Daniel unless it was proven that he sexually abused her child.

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1 Statutory references are to the Welfare and Institutions Code.

The department filed a dependency petition on Y.B.'s behalf under section 300, subdivisions (b) (failure to protect) and (d) (sexual abuse). In July 2017, at a combined jurisdictional/dispositional hearing, mother waived her trial rights, stating she understood the nature of the conduct alleged and the possible consequences of submitting the matter to the court. The court sustained the allegations in the petition and ordered mother to participate in counseling for domestic violence as a victim and for failure to protect from sexual and physical abuse. The court found the whereabouts of Y.B.'s alleged father were unknown. The department placed Y.B. in foster care.

By November 2017, mother was fully engaged in her services plan and her visits with Y.B. were appropriate. Consequently, the department scheduled two overnight visits in November. However, the department resumed supervised visitation after Y.B. reported she was taking a shower at mother's house when a man entered and washed her private areas. She told mother, but mother did not do anything about it. Mother denied a man was in her home during Y.B.'s overnight visits. The department was unable to substantiate Y.B.'s sexual abuse allegation regarding the unknown male.

Mother said Daniel left her home when Y.B. was removed and she had not had any contact with him since that time. She denied that Daniel sexually or physically abused Y.B. Y.B. never reported anything to her and she never saw Y.B. act or behave differently. When told that Y.B. became physically upset when she talked about Daniel and said she was afraid of him and did not feel safe with her, mother said the foster home had made Y.B. upset and scared.

The juvenile court continued reunification services for mother at the six-month review hearing in February 2018, finding her progress was moderate. Mother held to her belief that Y.B. was being manipulated into saying she was sexually abused.

In June 2018, mother's attorney filed a modification petition (§ 388), asking the juvenile court to return Y.B. to mother's custody. As changed circumstances, the petition

alleged Daniel no longer lived with mother and mother completed her "Learning to Protect" class and regularly attended her domestic violence class. Mother believed Y.B.'s best interest would be served by the requested order because Y.B. needed mother's "unconditional love." The juvenile court set a hearing on the petition for June 22, 2018, the date calendared for the 12-month review hearing.

On June 22, 2018, the juvenile court denied mother's section 388 petition and continued reunification services to the 18-month review hearing which the court set for October 24, 2018.

In July 2018, mother and Y.B. began conjoint counseling with therapist Karla Reyes. Initially, mother denied the sexual abuse allegation and did not want to blame Daniel. She minimized the severity of the abuse and made statements about Daniel as if advocating for him. However, in November, mother acknowledged her role in Y.B.'s sexual abuse and conceded she should have done more to protect her. Y.B. continued to tell the social worker she did not feel safe in mother's care.

In October 2018, the social worker made an unannounced visit to mother's home. She did not see Daniel's car parked in front and found no evidence of a male staying or living there.

In its report for the 18-month review hearing, the department recommended the juvenile court terminate mother's reunification services and set a section 366.26 hearing. It noted mother continually denied the sexual abuse allegations as recently as October 5, 2018, and only acknowledged her failure to protect Y.B. after being informed of the department's recommendation to terminate services. The department informed the court Y.B. was eligible for adoption and her foster mother wanted to adopt her.

The juvenile court conducted a contested 18-month review hearing on December 3, 2018. Mother testified and denied telling Reyes she did not believe Y.B. was physically or sexually abused. Mother testified that she always told Reyes she did

not know exactly what happened but believed Y.B., stating "If she said that it happened, then it happened." She last saw Daniel on April 30, 2017, and no longer communicated with him. She learned through her classes how to protect Y.B. by not allowing her around people she did not know.

The juvenile court found Y.B. would be placed at a substantial risk of detriment if returned to mother's custody, explaining:

> "It appears the child … still has fear of returning to the home. [¶] … She still has fear of any men coming into the home is the basis for her reluctance.… I think the evidence presents that the mother hasn't done anything … as far as alleviating or allaying the fears of the child. And the mother's equivocation regarding the credibility of the child is apparent in addition to what has been reported; the physical abuse and sexual abuse of the child. [¶] … [¶] … And so the therapist continues to state the mother minimizes the allegations in the petition, so we know what she says."

The juvenile court terminated mother's reunification services and set a section 366.26 hearing for April 2, 2019.

DISCUSSION

Section 366.22, the guiding statute, provides, in pertinent part, "the court shall order the return of the child to the physical custody of his or her parent … unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent … would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment." (§ 366.22, subd. (a)(1).) We review the court's finding for substantial evidence. (*In re Nickolas T.* (2013) 217 Cal.App.4th 1492, 1505; *id*. at p. 1507.)

Here, the juvenile court found mother's unwillingness to believe Y.B. was sexually molested and Y.B.'s fear mother would allow it to happen again presented sufficient risk to warrant her continued removal. As supporting evidence, the court relied on Reyes's report that mother minimized the abuse Y.B. suffered.

Mother, however, contends the evidence she minimized the sexual abuse Y.B. suffered was insufficient to support a detriment finding. Relying on *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738 (*Blanca P.*), she argues a parent's denial that sexual abuse occurred does not support a finding of detrimental return. We find *Blanca P.* easily distinguishable.

Dependency proceedings were initiated in *Blanca P.* with an original petition, alleging the children were victims of excessive corporal punishment, which the juvenile court sustained. (*Blanca P.*, *supra*, 45 Cal.App.4th at p. 1742.) A subsequent petition was thereafter filed, alleging the father had sexually molested one of the children. (*Ibid.*) The judge who presided over the hearing on the subsequent petition spent much of the hearing under the misapprehension that the father's responsibility for the sexual molestation had already been adjudicated, and the judge acknowledged he had not looked at the petition. (*Id.* at p. 1744.) A psychological evaluation later exonerated father of any propensity to sexually abuse children. (*Id.* at p. 1745.) Another judge presided over the 18-month review hearing, at which the social services agency presented evidence that the parents "had not made sufficient 'progress' in therapy and had not 'internalized' proper parenting skills, based mostly [on] the couple's refusal to admit, in therapy, that [the father] had molested [the child]." (*Id.* at p. 1747.) The juvenile court found it would be detrimental to return the children to the parents and set the matter for a hearing pursuant to section 366.26. (*Blanca P.*, *supra*, 45 Cal.App.4th at p. 1747.)

The appellate court ordered the trial court to hold a new hearing on the subsequent petition's molestation allegations. (*Blanca P.*, *supra*, 45 Cal.App.4th at p. 1759.) It first discussed the " 'confession dilemma' "—that is, the dilemma faced by a parent innocent of child molestation, who must either falsely admit molesting a child or lose custody of the child based on the parent's denial of the false allegation. (*Id.* at pp. 1752-1753.) This dilemma, the court concluded, "places an *extraordinary premium* on the correct

adjudication of a petition alleging sexual abuse. If an injustice occurs there, the hard fact of life is that the very innocence of the parent will in all likelihood render the family asunder.… [The hearing] is not the sort of thing to be rushed, or taken routinely." (*Id*. at pp. 1753-1754, fn. omitted.) The court concluded that "collateral estoppel effect should not be given, at a 12-or 18-month review, to a prior finding of child molestation made at a jurisdictional hearing when the accused parents continue to deny that any molestation ever occurred and there is new evidence supporting their denial." (*Id*. at p. 1757.)

Here, mother did not dispute the allegations that Daniel sexually abused Y.B. by digitally penetrating her and that she observed him doing it and failed to report it to law enforcement. Further, there is no suggestion the juvenile court did not understand the issues or the evidence before it when it sustained the sexual abuse allegation. Nor is there any independent evidence exonerating Daniel. Consequently, this is not a case like *Blanca P*. where the detriment finding was based on a factually erroneous molestation finding made at a jurisdictional hearing.

Mother also likens her case to *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322 (*Jennifer A.*), another case in which appellate relief was granted from a detriment finding at the 18-month review hearing. (*Id*. at pp. 1328, 1347.) In *Jennifer A.*, the mother's five-year-old and 18-month-old sons were removed from her custody because she had left them unattended in a motel room while she worked. (*Id.* at p. 1328.) Although there was no evidence she had a substance abuse problem, her services plan required her to drug test and complete outpatient treatment if she tested positive. (*Id*. at pp. 1327, 1331.) After missing several tests and testing positive for alcohol, the mother was required to undergo drug treatment. (*Id*. at p. 1331.) She subsequently tested positive for marijuana, missed multiple drug tests, was unable to void once and gave diluted specimens on multiple occasions. (*Id*. at pp. 1342-1343.) However, by the time of the 18-month review hearing, she had substantially complied with the terms of her

reunification plan, there was no evidence she used any drugs other than alcohol and marijuana, or that she ever drank alcohol or smoked marijuana around the children. (*Id*. at pp. 1343, 1345.) She had daily, unmonitored visits with the children, her interactions with them were appropriate and they were happy to be with her. (*Id*. at p. 1336.) In addition, the social worker continually reported that her parenting skills were improving, and her therapist opined as early as the six-month review that mother was " ' "far removed from ever leaving the children unattended" ' and had learned ' "proper parenting and boundaries of protecting the children." ' " (*Id*. at p. 1346.)

The *Jennifer A.* court concluded the mother's marijuana and alcohol use did not pose a substantial risk of harm to her children and directed the juvenile court to vacate its orders terminating reunification services and setting a section 366.26 hearing and to conduct a new 18-month review hearing. (*Jennifer A., supra,* 117 Cal.App.4th at pp. 1328, 1347.)

Mother contends her circumstances by comparison to those in *Jennifer A.* present an even more compelling case for finding insufficient evidence of detriment. She not only enjoyed positive and loving visits with her daughter like the mother in *Jennifer A.*, she points out, but made greater progress by completing all her required services. The problem, however, with mother's argument is that compliance with a services plan apart from remediating the problem that required the child's removal does not eliminate the detriment a child would face if returned to parental custody. In *Jennifer A.*, the mother's marijuana and alcohol use did not pose a substantial risk of harm to her children. Here, on the other hand, Y.B. was removed from mother's custody because she was sexually molested while in mother's care and with mother's knowledge and for 16 months mother refused to believe the act occurred. Mother's denial perpetuated the risk of harm to Y.B. should she be returned to mother's custody and supported the juvenile court's finding of detrimental return.

DISPOSITION

The petition for extraordinary writ is denied. This court's opinion is final forthwith as to this court pursuant to rule 8.490(b)(2)(A) of the California Rules of Court.